No. 93-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEORGIANN L. GRACE and JAMES B. POTTS, JR.,
Petitioners,

v.

FRANK MORGAN, JR., DWIGHT D. VINES and
DAVID K. JEFFREY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WENDELL G. LINDSAY, JR.
Counsel of Record
Special Assistant Attorney General
LINDSAY, MARCEL & SMITH
9431 Common Street
Baton Rouge, Louisiana 70809
(504) 924-5150

for

RICHARD P. IEYOUB
Attorney General
State of Louiisiana
Attorneys for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

QUESTION PRESENTED FOR REVIEW

1. Respondents suggest that the questions presented by petitioners unnecessarily complicate the issue for the court's consideration. Keeping in mind that the content and form of petitioners' state court suit are not disputed and that both the district and appeals courts found that petitioners filed their state court suit in the context of and primarily in furtherance of their own personal grievances, the only issue here is:

> When, in the context of and primarily in furtherance of their own previously lodged personnel grievances, state university employees exercise speech in the form of a state court suit, the contents of which relate primarily to these personal employee grievances but contest the university personnel grievance procedure and seek to enjoin its use in their own grievances, is the filing of such a suit protected First Amendment activity?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iv

Statement of the Case 1

Summary of the Argument 3

Argument 5

I. Petitioners' Claims that *Connick* Was Not Followed in This and Other Fifth Circuit Cases 5

A. The Lower Courts Correctly Applied *Connick* Here 6

B. *Connick* Is Not "Content Determinative," As Petitioners Claim 7

C. There Is No Conflict Between the Circuits, and Their Analyses Are Consistent With *Connick* 8

D. Even Under A Test Based Solely on Content, Petitioners' Suit Would Not Be Constitutionally Protected 11

Contents

Page

II. Petitioners' Claim That Any Motive Inquiry Is A Matter For the Jury 11

III. Petitioners' Claim That Petition Clause Confers Greater Rights Than Free Speech Clause 12

A. Petitioners' Claim Is Contrary to Well-Settled Law and A Change Would Be Unworkable 13

B. Petitioners' Claim that Petition Clause Provides Protection in Other Areas of the Law Without Any Showing of Public Concern 15

1. *Anti-Trust Field* 15

2. *Labor Field* 16

3. *Prisoner Access to the Courts Field* 17

Conclusion 19

TABLE OF AUTHORITIES

Cases Cited: **Page**

Altman v. Hurst, *734 F.2d 1240 (7th Cir. 1984)* *19*

Bill Johnson's Restaurant, Inc. v. N.L.R.B., 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) 16

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) 12

Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) 17

Brinkmeyer v. Thrall Independent School Dist., 786 F.2d 1291 (5th Cir. 1986) 19

California Motor Transport Co. v. Trucking, Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) 15,16

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) 3,4,6,7,8,9,10,11,12,15

Day v. South Park Independent School District, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1985) 14

Eastern Railroad Presidents Conference v. Noerr Motorfreight, Inc., 365 U.S. 127, 144, 81 S.Ct. 523, 533, 5 L.Ed.2d 464 (1961) 16

Franco v. Kelly, 854 F.2d 584 (2nd Cir. 1988) 19

Authorities

Page

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) 18

Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969) 18

Johnson v. Harris County Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989) 10

Kemp v. State Board of Agriculture, et al, 803 P.2d 498 (S.Ct. Co. 1990) 14

McDonald v. Smith, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985) 13,14

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993) 9,10,11

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) 10,12

Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989) 14

Singh v. Lamar University, 635 F.Supp. 737 (E.D. Tex. 1986) 14

Smith v. Maschner, 899 F.2d 940 (10th Cir. 1990) . . 18

Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) 7

Authorities

Page

Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) 14

STATEMENT OF THE CASE

Respondents vigorously object to the characterization and "spin" petitioners have given to this case and, further, suggest that much of the factual material claimed by petitioners is not relevant in this proceeding.

For example, Grace was not "terminated." Grace was an untenured English instructor hired by NLU on a year-to-year basis. Her contract, along with three other instructors who were similarly "doubly inbred" (all four had both their B.A. and M.A. degrees from NLU), was not renewed after NLU recruited Dr. Jeffrey from Auburn to become the new department head and after he began a program to upgrade the department and replace temporary instructors holding only M.A.'s, especially those who had NLU M.A.'s, with young Ph.D.'s. The timing of the notice of non-renewal was unfortunate, but was dictated by terms of Mrs. Grace's contract requiring notice of non-renewal by a certain date.

Similarly, Potts was not "demoted." His only claims were that his salary, which was already higher than that for most of the department's faculty, was not increased commensurately with others, that he did not like the classes he was assigned to teach, and that his class load was heavier than certain other faculty members. Dr. Jeffrey testified that other faculty members were more deserving of greater salary increases, that Potts was assigned to teach more classes because he was not publishing and had no administrative duties, and that the class assignments were necessary to accommodate Potts' own schedule requests.

As another example, there was no credible evidence that Grace's office was "trashed." Petitioners abandoned

that claim at trial.

Prior to trial petitioners asserted many, many claims against a number of defendants, and never focused on their state court suit/free speech claim. Because of their volume, and the shotgun and amorphous nature of these many claims, the trial court had instructed petitioners to provide "a short, clear description of each plaintiff's specific claims against each defendant." Nevertheless, plaintiffs responded with fifty-two pages! R., p.1055. One claim, the state court suit/free speech claim, slipped through defendants' defenses, with the jury returning a verdict in favor of petitioners on that issue against three defendants. Since petitioners do not now complain about the district court's granting a new trial and only seek review of its subsequent summary dismissal, respondents suggest that the only facts necessary for the court's consideration are those that follow, if this much:

Dr. Potts and Mrs. Grace, who was hired by Dr. Potts when he previously served as department head, pursued several grievances against the actions of the department head who served after Dr. Potts but before Dr. Jeffrey. These grievances mostly involved the denial of Dr. Potts' and Mrs. Grace's demands that they be allowed to miss their classes and travel out-of-town together to pursue their private consulting business, their complaints about inadequate salary increases, and Mrs. Grace's demands that she be assigned to teach certain courses.

Petitioners pursued these grievances utilizing the faculty grievance procedure as provided in the *Faculty Handbook*, were dissatisfied with the results they achieved at the lower levels of the grievance process, and then prior to the later stages of appeal in the grievance proceeding filed a suit in state court contesting the procedures set forth in the

handbook and seeking a temporary stay of further consideration of their grievances. This suit was clearly a part of petitioners' continuing efforts and was filed in the context of and primarily for that purpose. While the trial testimony and other materials considered by the district court on the summary judgment motion support this conclusion, no review of them is necessary because the conclusion is clearly evident from the state court's pleadings themselves, which appear as Appendices D and E to petitioners' application. Moreover, the petitioners themselves do not appear to seriously contest this characterization of their state court suit.

SUMMARY OF THE ARGUMENT

(1) Petitioners' claim that *Connick* was misapplied here.

Petitioners claim that the lower courts misapplied *Connick v. Myers*[1] in this case and that the Fifth Circuit does so on a regular basis.

Connick directs that courts examine three aspects of questioned speech to determine whether it qualifies as "a matter of public concern," which in turn will be deemed constitutionally protected if it also passes the *Pickering* test for balancing the protected nature of the speech with the disruption that it may cause. The three examination criteria are content, form and context, considering all of the circumstances of the case. The lower courts in the case at bar meticulously examined all of the circumstances of the case in light of these three criteria and concluded that petitioners acted not as citizens speaking out on a matter of

---

[1] *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

public concern but as employees upon matters of personal interest.

Petitioners claim that the lower courts should not have considered all three criteria and should have only considered content. They say that some of the courts of appeal follow this view and that a writ is necessary to correct the alleged error in this case and resolve the conflicts between the circuits. However, there is no conflict between the circuits. Further, even the approach taken in the court of appeals case most favorable to petitioners would still result in a judgment in favor of respondents because it holds that mere content is sufficient only in cases where the speech is inherently a matter of public concern and that in other instances the courts must also consider form and context. Another reason that the utilization of this approach would still result in a judgment in respondents' favor is that, even if only the contents of the state court suit were considered, these contents nonetheless are primarily about petitioners' personal grievances and only touch on issues which may be of concern to the public.

Petitioners apparently counter that *Connick* should be interpreted so that if the speech even just touches on a matter of potential public interest then the entire speech should be considered a matter of public concern and should be given protected constitutional status. This argument, however, flies in the face of the *Connick* requirements that form and context as well as content be examined. Moreover, such an approach would be completely unworkable, since almost anything concerning public employment is potentially a matter of public interest and almost all public personnel disputes would thereby be elevated to constitutional status and require the federal judiciary to be their final arbiter.

(2) Petitioners' claim that any motive inquiry is for the jury.

It is well-settled by the jurisprudence of this court that the determination as to whether speech is protected is a question of law and is not a matter for the jury.

Moreover, even if content, form and context were normally matters for a jury to decide, in this case there is no genuine issue as to material fact relating to them and summary judgment would be appropriate.

(3) Petitioners' claim that Petition Clause confers greater rights than Free Speech Clause.

Petitioners claim because their state court suit was an act of petitioning it does not even have to address a matter of public concern. However, this and other federal courts have already determined that the Petition Clause does not have special First Amendment status, and that acts of petitioning must address matters of public concern.

Moreover, a different rule would open a floodgate of federal litigation.

ARGUMENT

I.

PETITIONERS' CLAIMS THAT *CONNICK* WAS NOT FOLLOWED IN THIS AND OTHER FIFTH CIRCUIT CASES

Petitioners claim that the Fifth Circuit misconstrued

and misapplied *Connick* in this and other cases, and by claiming that the circuits "are divided," suggest that there is a conflict between them. However, in this case the lower courts meticulously and faithfully followed *Connick's* instructions. Moreover, there is not a conflict among the circuits, and their decisions are consistent with *Connick*.

A. The Lower Courts Correctly Applied *Connick* Here

In the case at bar the two lower courts went through an exhaustive analysis of the relevant facts to apply *all* of the *Connick* criteria. They did not merely consider petitioners' motive, as their writ application suggests.

Connick teaches that speech is not protected "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest ...." 461 U.S. at 147.

It further states that such "*a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record.*" (Emphasis added.) *Ibid.*

In an exceedingly well-reasoned opinion (which appears on pages 17a-26a of petitioners' writ application), the district court closely examined all three factors. It concluded that while the form of the petitioners' speech was a lawsuit and therefore in a public forum, that fact alone was not determinative, and that both the content (a suit which touched on matters of public concern but which was primarily about petitioners' personal grievances) and the context (filing to obtain relief for petitioners' own personal grievances as part of a continuing personnel dispute) showed that petitioners spoke primarily as disgruntled employees.

(Pp. 21a-26a.)

The court of appeals made a very similar analysis, considering all three factors. (Petitioners' writ application, pp. 5a-11a.)

B. *Connick* Is Not "Content Determinative," As Petitioners Claim

The main theme of petitioners' writ application is their claim that this court in *Connick* mandated a "content determinative" test (p. 13), meaning that if "any part of the communication addresses an issue of 'public concern'" it is protected (p. 19.)

This claim, however, flies in the face of the clear instructions in *Connick* that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." Moreover, petitioners' test would be completely unworkable. "Because almost anything that occurs within a public agency could be of concern to the public,"[2] other factors, such as form, context and the degree and importance to the public of the speech's content, must be considered. Otherwise the federal courts would find themselves as the final arbiters of most governmental employee disputes. In *Connick*, this court indicated that it had no desire to become so involved, and stated:

---

[2]*Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). This court has made a similar remark in *Connick*: "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case." 461 U.S. at 149.

> Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. 461 U.S. at 147.

Here, there are no unique or significant matters of public concern expressed. Petitioners' claim that the government entity's grievance procedure was unlawful is one that can be duplicated in one form or another in virtually every public employment setting. Therefore, if petitioners' argument is accepted it would give most grievants a powerful incentive to claim that they were retaliated against for complaining about personnel procedure, thereby drawing the federal judiciary into the resolution of these public employment disputes.

C. There Is No Conflict Between the Circuits, and Their Analyses Are Consistent With *Connick*

Petitioners claim that "[t]he Courts of Appeal have adopted numerous applications of the Connick Balancing Test, many of which are in direct conflict." Writ application, p. 10. They then describe the three "most prevalent" applications as "content determinative," "content balanced," and "motive determinative." Apparently the courts of appeal themselves do not use these terms and respondents suggest that they are artificial classifications which fail to describe the true state of the law in each circuit.

The failure of these terms to describe the state of the law in each circuit can be seen, first of all, in the fact that

according to petitioners' own computations five circuits (the Ninth, Tenth, Sixth, Eighth and Seventh) use more than one of these approaches! Text of writ application, pp. 10-11. Moreover, a close examination of the cases petitioners cite as falling within individual classifications reveal that in fact they all do not fit there, and that the classifications are forced.

In reality what the lower courts appear to be doing is applying *Connick*. They are examining the content, form and context of the speech as revealed by the whole record.

As an example, let us consider what is probably the most extreme case and the one with which the petitioners lead and take their best shot, *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir. 1993). Apparently petitioners have chosen to emphasize *O'Connor* because it does claim that the appellate courts "have adopted various approaches" with some utilizing a "content based analysis" and others utilizing "an analysis which turns entirely or in part on the employees' subjective intent." *Id.* at 913. But this characterization, especially considered in light of the whole opinion, does not mean that these appellate courts are not following *Connick* or that their opinions conflict.

O'Connor acknowledges that the First Circuit's "own case law implicitly recognizes [that] the circumstances of a particular case may govern the appropriate approach under *Connick*." *Ibid.* It then takes the position that in some cases the speech's topic may be "clearly a legitimate matter of *inherent* concern to the electorate, [and in those] the court may eschew further inquiry into the employee's motives as revealed by the 'form and context' of the expression." (Emphasis in the original text.) *Id.* at 913, 914. It acknowledged, though, that "[o]n the other hand, public

employee speech on a topic which would not necessarily qualify, on the *basis of its content alone*, as a matter of inherent public concern ... may require a more complete *Connick* analysis into the form and context of the public employee expression ...." *Id.* at 914.

Further, the approach in *O'Connor* is actually similar to that taken by the Fifth Circuit in another case in which it considered only context to reach a conclusion that the speech there was inherently a matter of public concern. In *Johnson v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), that court noted that "[u]nder circumstances ... the context in which the employee speaks may be sufficient to elevate the speech to the level of public concern." *Id.* at 1577. It then held as a matter of law that "when one state employee testifies in another employee's civil action against their mutual state employer, the witness's testimony constitutes a matter of public concern for First Amendment purposes." *Ibid.*

As authority for its focusing only on context the Fifth Circuit cited *this* court's decision in *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), holding that constitutional protection was afforded to a county constable's clerical employee's "puerile" comment to the effect that she hoped that the next assassination attempt on President Reagan would be successful. There this court had no difficulty in deciding that the statement was a matter of public concern even though its content may be "inappropriate" or "erroneous," 107 S.Ct. at 2898, *"[c]onsidering the statement in context, as Connick requires ...."* (Emphasis added.) *Id.* at 2897.

D. Even Under A Test Based Solely on Content, Petitioners' Suit Would Not Be Constitutionally Protected

All *O'Connor* and the other "content determinative" cases stand for is that the content of some expressions is inherently of public concern and that for these expressions form and context need not be considered. It does not say that in cases such as the one at bar that mere content should control.

In fact, even if the *O'Connor* approach were applied to the case at bar it could not be said that an examination of the content of petitioners' state suit would result in a holding that the suit was constitutionally protected activity. As the lower courts held, the suit is primarily about petitioners' personal grievances and it by itself reveals that the suit was filed by petitioners as employees for the purpose of advancing their own ends. Surely the suit would not qualify as inherently a matter of public concern, and a consideration of context would result in the same judgment of dismissal which the Fifth Circuit upheld.

II.

PETITIONERS' CLAIM THAT ANY MOTIVE INQUIRY IS A MATTER FOR THE JURY

Petitioners claim that, if *Connick* requires or authorizes scrutiny of the motive for their state court suit, then such scrutiny is a matter for the jury.

Petitioners' argument misses the point. As explained previously, *Connick* teaches that the speech in question should be evaluated from the standpoints of its content, form

and context, considering the whole record. The lower courts here did so. Motive is relevant when considering each of these three factors to determine whether petitioners were primarily speaking as citizens on matters of public concern or whether they primarily spoke as employees on matters which were their own personal grievances.

Moreover, it is well-settled that the determination as to whether speech is protected is an inquiry of law, and is not a fact inquiry for the jury. *Connick* itself makes this point clear. 461 U.S. 148 n.7, 151 n.10. Also *Rankin v. McPherson, supra.*; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984).

Still further, reasonable minds could not differ on the contents of petitioners' state court suit (content), the fact that the suit was filed (form), and the fact that the suit was filed by petitioners primarily if not entirely for the purpose of assisting them in their already on-going personal personnel dispute (context). Therefore, even if these issues normally would be within the province of the jury, in this case it would be appropriate for the court to make the determination. The court later did so by way of summary judgment, which was appropriate because there was no genuine dispute as to material fact.

III.

PETITIONERS' CLAIM THAT PETITION CLAUSE CONFERS GREATER RIGHTS THAN FREE SPEECH CLAUSE

A. Petitioners' Claim Is Contrary to Well-Settled Law

and A Change Would Be Unworkable

Petitioners' claim that the Petition Clause confers broader rights than the Free Speech Clause and, that when employees' actions can be considered acts of "petitioning" their government, the subject of such actions does not even have to be a matter of public concern in order for the actions to receive protected status.

The court of appeals in the decision below rejected this argument, stating:

> There is no support in authority or in logic for construing the petition clause more broadly than the speech clause. The Supreme Court stated this unequivocally in *McDonald V. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985):
>
> > To accept petitioner's claim ... would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition ... than other First Amendment expressions.

> 472 U.S. 479, 485 (1985). Similarly, in *Day v. South Park Indep. School Dist.*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1985), this court explicitly rejected the claim that matters of private concern, whether raised as speech or petition claims, are protected by the First Amendment's shield. (Writ application, p. 12a).

See also, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) at 470 U.S. 610 n.11 ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis."); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989). (Employee's opposition to her demotion and filing suit related only to supervisor's employment decisions and were not considered matters of public concern; "[t]he law is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or law suit." 878 F.2d at 842); *Singh v. Lamar University*, 635 F.Supp. 737 (E.D. Tex. 1986) ("Although the right to petition and the right to free speech are inseparable guarantees, the rights were cut from the same cloth as other guarantees of the First Amendment...and therefore are generally subject to the same constitutional analysis," citing *Wayte, supra* and *McDonald v. Smith, supra.); Kemp v. State Board of Agriculture, et al*, 803 P.2d 498 (S.Ct. Co. 1990) (Petition rights are subject to the same "balancing" tests which apply to free speech and, under circumstances of case, right to petition U.S. senator was outweighed by university's interest in maintaining its grievance procedure.")

Moreover, if the law were changed as petitioners wish, such a change would not be workable and would open a floodgate of federal litigation. Since filing a grievance or even writing a letter to a governmental official are considered acts of petitioning, respondents suggest that a Petition Clause claim would be possible in a very substantial percentage of personnel disputes. Again, as this court noted in *Connick*, the function of federal courts is to ensure that citizens are not deprived of fundamental rights because of their government employment and it is not to provide them with greater rights than employees who do not work for the state. 461 U.S. at 147.

B. Petitioners' Claim that Petition Clause Provides Protection in Other Areas of the Law Without Any Showing of Public Concern

Petitioners apparently would have this court believe that the cases cited by them stand for the proposition that this court has already acknowledged that in anti-trust, labor, and prisoner access to the courts cases there can be no restrictions on or retaliation for the exercise of litigants' Petition Clause rights, even if there is no showing of "public concern." Writ application, pp. 25-30. However, such is not the case.

1. *Anti-Trust Field*

California Motor Transport Co. v. Trucking, Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), is advanced by petitioners as authority for their thesis in the anti-trust field. But this case supports no such view and, in fact, is authority for the principle that there *are* permissible governmental restrictions on petition rights.

In *California Motor Transport*, a number of highway carriers brought an action against other highway carriers, alleging that the latter had conspired to monopolize transit and to institute state and federal proceedings to defeat the formers' applications to acquire operating rights or to transfer or register those rights. The alleged conspirators defended by claiming that by the *Noerr* doctrine their petition clause rights could not be limited or restrained by the Sherman Act.

This court *rejected* that argument, pointing out that even in *Noerr* it had noted that there could be instances in which the filings by the alleged conspirators were "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 404 U.S. at 511, quoting *Eastern Railroad Presidents Conference v. Noerr Motorfreight, Inc.*, 365 U.S. 127,144, 81 S.Ct. 523, 533, 5 L.Ed.2d 464 (1961).

This court ruled therefore against the alleged conspirators, upholding the principle that the Sherman Act *prohibits* the exercise of petition rights if they are part of a conspiracy in restraint of trade.

2. *Labor Field*

The case advanced by petitioners as authority for their thesis in the labor field is no better. They cite *Bill Johnson's Restaurant, Inc. v. N.L.R.B.*, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), as standing for the authority that the N.L.R.B. may not halt the prosecution of a state court lawsuit for damages as a result of libel and injury to business reputation allegedly caused by a picketing employee. Petitioners further claim that in this case "this

court held that the mere act of petitioning was protected...." Writ application, p. 27.

The basic facts were that an employee had filed an unfair labor practice charge after she was fired. The restaurant then filed its suit against the employee and other employees in Arizona state court. The employee then filed a second unfair labor practice charge, claiming that the state suit court was in retaliation for the employees' protected, concerted activities and for her first unfair labor practice charge. The N.L.R.B. found the state suit to be retaliatory and ordered it withdrawn.

This court did vacate the order and remand the case. However, it did *not* hold, as petitioners suggest, that the N.L.R.B. could not enjoin the suit. In fact, it clearly stated that the N.L.R.B. *could* enjoin a suit which was retaliatory or otherwise had an illegal objective under the N.L.R.A. The case was remanded only because the court decided that the administrative law judge had not made a sufficient factual inquiry.

In other words, just as with the case cited by petitioners for support of their thesis in the anti-trust field, this case actually disproves it in the labor field.

3. *Prisoner Access to the Courts Field*

Neither do the cases proffered by petitioners in the prisoner field support their thesis that they are entitled to protection under the Petition Clause without any showing of public concern.

The first case is *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). That case held that the

"fundamental right of access to the courts" required state prisons to provide adequate law libraries or adequate assistance from persons trained in the law. There appears to be nothing in the opinion to suggest that the holding was bottomed on the Petition Clause, and the precedent cases cited appeared to have been based upon habeas corpus rights. See 430 U.S. at 822, 825. The dissent complained that the "[t]he Court leaves us unenlightened as to the source of the 'right of access to the courts'...." 430 U.S. at 833.

The second case is *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), which held unenforceable a state prison rule prohibiting inmates from assisting other inmates in preparing writs and other legal papers. Again, the case involves habeas corpus rights and there appears to be no indication that the Petition Clause was in any way authority for the court's holding.

The third case is *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), which held that prison inmates are not entitled to Fourth Amendment protection against unreasonable searches and seizures in their cells. Respondents fail to discern how the Petition Clause is in any way implicated in this decision.

Petitioners also cited two courts of appeals decisions, the first of which is *Smith v. Maschner*, 899 F.2d 940 (10th Cir. 1990). *Smith* merely held that an inmate may have valid claims that he was denied procedural due process by the denial of his request to call a witness and that officials retaliated against him for exercising his "right of access to the courts." The Petition Clause appears not to have played any role in the decision.

The second case, *Franco v. Kelly*, 854 F.2d 584 (2nd Cir. 1988), does discuss the Petition Clause. There an inmate claimed he had been retaliated against for his cooperation in a state administrative investigation of allegations of inmate abuse, and the court decided his right to provide information on this subject was protected by his right to petition for redress of grievances.

This holding, however, is a far cry from setting forth a principle that there can be no restraints on a person's exercise of his petition rights and that public concern considerations are irrelevant. Indeed, the court of appeals was careful to note a public concern aspect of the inmate's speech/petition in that "the very same communications that *Franco* allegedly directed to state administrative authorities implicated an important constitutional right -- namely the Eighth Amendment right of prison inmates to be free from cruel and unusual punishment." 854 F.2d. at 590.

CONCLUSION

"[A] private office dispute [with a public employer] cannot be constitutionalized merely by filing a legal action." *Altman v. Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 385, 83 L.Ed.2d 320 (1984), quoted with approval in *Brinkmeyer v. Thrall Independent School Dist.*, 786 F.2d 1291, 1296 (5th Cir. 1986).

Respondents urge that petitioners' application for a writ of certiorari be denied.

WENDELL G. LINDSAY, JR.
Counsel of Record
Special Assistant Attorney General
LINDSAY, MARCEL & SMITH
9431 Common Street
Baton Rouge, Louisiana 70809
(504) 924-5150

for

RICHARD P. IEYOUB
Attorney General
STATE OF LOUISIANA
Attorneys for Respondents